Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

WILSON W. WILSON, appearing in his capacity as the curator of the interdict, CHRISTEL W. FONTENOT,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the finding of fact by the District Court–that defendant respondent State Farm Fire and Casualty Company failed to carry its burden of proof that plaintiff/petitioner, the interdict Christel W. Fontenot started (set) the fire on July 17, 1995, which totally destroyed (demolished) the family home, the community property owned by petitioner and her husband Martin M. Fontenot, Jr., who on Friday immediately next preceding Monday, July 17, 1995, the date of the arson-caused fire occurred, had removed his personal possession and the personal possession of his boys, except that he forgot his gun and the guns of the boys which were in the closet, but remembering to return to the house on Sunday, July 16, 1995, next preceding the date of the arson-caused fire and remove them from the house before going (taking off) with the boys for Houston, Texas, after first filing for a [D]ivorce in the Family Court of East Baton Rouge Parish, Louisiana, with special/specific instruction to the Sheriff that the Petition for Divorce be served on his wife the interdict Christel W. Fontenot immediately following the filing of the divorce petition with the Clerk of Court, or as soon as practicable thereafter; and then made arrangements with a friendly neighbor to care for his horse while he is away in Houston, Texas and expressing to others the self-fulfilling prophecy that he "would not be surprised that Christel burn the house down when once the Petition for Divorce is served upon her – was maintainable and not manifest error; and the judgment of the District Court should not have been reversed by the Court of Appeals, Fifth Circuit.

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OPINIONS BELOW

The unpublished decision of the Court of Appeals for the Fifth Circuit, dated May 5, 2006, is set forth as Appendix A. The decision from the bench of the United States District Court for the Middle District of Louisiana, filed on January 3, 2005, is set forth as Appendix B.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None

STATEMENT OF THE CASE

A. Nature of the Case:

The nature of this lawsuit is trenched in the allegations of plaintiff's petition/complaint (Supp. R. Vol. 1, pg. 07) asserting generally and specially that the respondent STATE FARM FIRE AND CASUALTY COMPANY acting in **bad faith** had arbitrarily, capriciously, or without probable cause, refused and failed to live-up-to and honor its responsibility owed its insured, the petitioner CHRISTEL W. FONTENOT, a diagnosed mentally ill person of **bi-polar disorder**–mixed type, who is an interdict prosecuting this action through her duly appointed curator **WILSON W. WILSON** as appearing by referenced to the petition/complaint.

The petitioner CHRISTEL W. FONTENOT, who, on July 17, 1995, owned in community a house with her husband Martin M. Fontenot, Jr., which was covered with a Home Owners' policy of insurance, in full force and effect, at the time of the occurrence of the fire at its location municipally designated as 9024 Staring Court, Baton Rouge, Louisiana 70810, at which time a fire occurred, in the late afternoon, on July 17, 1995, while petitioner and her husband Martin M. Fontenot, Jr. and their five (5) boys Marty, age 25, Brodi, age 18, Arloe, age 17, Jacques, age 14 and Nigel, age 11, were absent, petitioner had gone joy-riding. The husband, Martin M. Fontenot, Jr., had filed a **petition for divorce** and had absented himself with the boys, Brodi, age 18, Arloe, age 17, Jacques, age 14 and Nigel, age 11, and allegedly had gone out of town to Houston, Texas when the arson-caused fire occurred on July 17, 1995.

B. Course of Proceedings and the Disposition Below:

Petitioner commenced this action by filing the petition/ complaint in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, on July 12, 1996, which was removed from the State Court to the United States District Court, Middle District Louisiana, at the instant of the defendant STATE FARM FIRE AND CASUALTY COMPANY'S exercise of diversity citizenship pursuant to 28 U.S.C. § 1331, the jurisdiction amount being satisfied.

Initially, upon the assumption of jurisdiction by the United States District Court, the case was assigned to Section B, over which the Honorable Frank J. Polozola presides; and was presiding over this case before he recused himself and prior to the petitioner being criminally arrested therein during the ongoing of the trial of the case before him; which criminal

prosecution followed in the criminal District Court of East Baton Rouge Parish, Louisiana, where the criminal charge(s) of arson was dismissed against her for lack of evidence to sustain the charge of arson against her.

After the criminal charge of arson against the petitioner in the State Criminal District Court was dismissed for insufficient evidence to support the prosecution of the crime for which she was charged by the State of Louisiana, this case was reopened for the continuing of the civil proceedings in the United States District Court, the Honorable Frank J. Polozola recused himself for reasons undisclosed and the case was then assigned to Section D of the United States District Court, presided over by the Honorable Ralph E. Tyson, Judge, who after a plenary bench-trial issued and caused to be entered Judgment, Appendix, Reasons for Judgment and the Judgment in favor of petitioner on October 22, 2003, from which Judgment the respondent STATE FARM FIRE AND CASUALTY COMPANY has appealed to the Court of Appeals, Fifth Circuit, upon filing its Notice of Appeal on April 24, 2003.

C. Statement of Facts Relevant to the Issues Submitted For Review:

In this case, based on arson, and incendiary burning, the burden of proof was on the respondent to prove that the arson-caused fire, which demolished the house owned in community by petitioner and her husband Martin M. Fontenot, Jr., was initiated/started by petitioner; and the petitioner did not have to prove that she did not set the fire. But the burden of proof was on the respondent to prove that petitioner set the fire in order for the respondent to prevail in this case. The respondent STATE FARM FIRE AND CASUALTY COMPANY **failed to carry its burden of proof.**

The witness, Dr. Scott David Zenter, a psychiatrist, called as an expert witness in the case, testified that he for the last four (4) years next preceding the trial of this case that petitioner has been an outpatient of his Monroe Mental Health Center; that he had also treated her at Conway Memorial Hospital in Monroe Hospital, and continued to treat her up until the day of trial; that during his course of treating her in late 1996 or early 1997 in the course of discussing some of her problems, as a second line issue in her treatment, she attributed that at some point during the course of the discussion that she had criminal charges pending against her; but, was not sure of the exact charges but that was playing a role that he (Dr. Scott David Zenter, thought was of the opinion) that caused her some worries.

Dr. Zenter testified that upon his commencement of seeing/treating the plaintiff in late 1996, he had the benefit of examining her prior medical record of treatment when she came under his care as an aftercare patient, following discharge from E.A. Conway Hospital where (she had been given a diagnosis of **Bi-Polar Disorder**.) That **Bi-Polar Disorder** is a particular type of **mental illness**, commonly known over the years as **manic depressive illness**, and it generally involves a cycling phenomena of depressed moods with manic mood occurring over a period of time, which means she suffered moods of upward swings and downs and lows.

The respondent stresses the basic fact for its contention that the petitioner set the fire, which burned down petitioner's house on July 17,1995, for reasons she had absented herself from the house when the house caught fire, notwithstanding that the petitioner's husband and the five (5) boys of the family were, also, absent from home and that her husband,

Martin M. Fontenot, Jr., had filed a petition for divorce in the Family Court of East Baton Rouge Parish , Louisiana, and had instructed the Office of the Sheriff of that Parish to make prompt service of the divorce petition upon the petitioner, and accordance to witnesses had also made statements of self-fulfilling prophesies "that he would not be surprised that the petitioner would not burn the house down when service of the petition of divorce is made upon her". However, service of the petition for divorce was not made upon petitioner until the day after or **a couple days** after the home had been burned down and investigation of the fire was ongoing.

Notwithstanding the basic contention of respondent that petitioner being absent from home at the time of the occurrence of the fire, Dr. Zenter testified at, in sum, negates respondent's contention that petitioner being away from home at the time of the occurrence of the fire was not in anywise indicative that she set the fire that burned the house down on July 17, 1995.

Dr. Rita Agarwal, a psychiatrist at E.A. Conway Hospital, testifying as an expert witness, testified, *inter alia*, as follows:

That she saw the petitioner the first time, as a patient, who was brought into her office by her brother stating that she had a problem; and that her diagnosis was **Bi-polar Disorder**; that there was a history of wandering and she was estranged from her husband. There was no personality disorder, no societal, or homicidal thoughts. There was no history of any kind of behavioral problems.

Dr. Agarwal, testified that the petitioner was not a violent person; that she was less violent then an ordinary person; that there wasn't anything in her medical records to indicate that she has a propensity of setting a house on fire.

Martin M. Fontenot, Jr., the petitioner's estranged husband of a few days prior to the fire occurring on July 17, 1995, made the subject matter of this lawsuit, testifying at *inter alia*, as follows:

That he was married to the petitioner CHRISTEL W. FONTENOT, for a period over 29 years; that of that marriage five (5) children were born and that he initiated and filed a petition for a divorce against her.

Mr. Fontenot testified that he separated from his wife, petitioner; and he left the house with some clothes on that Friday next preceding Monday, July 17, 1995, the date of the fire that burned the house down; and went and lived with a friend, Mr. Russell Mayfield, that he left someone, **Arthur Anthony Fabre** in charge of taking care of his horses; and that he ascertained that the side door to the house was firmly closed and locked; that when he left to go to Houston on Sunday immediately next preceding Monday, July 17, 1995, he had also **filed a petition for divorce on Friday**, next preceding the Monday the day of the fire; that the divorce papers were served on the petitioner on Wednesday following the Tuesday which next followed the day of the fire which was the day on which he and the boys returned to Baton Rouge from Houston "that he was divorced from his wife by Judgment of the Family Court in February 1996; **and that he was found,** by the Family Court, **to be at fault**; that he, Martin M. Fontenot, Jr., is a Chemist and an Engineer with Master Degrees in both; but that he had not mastered the art

where you can put something down two (2) days ahead of time and then it is going to ignite sometimes subsequent thereafter. However, Mr. Fontenot denied making self-serving fulfilling prophecies to the effect that he wouldn't be surprised that when the Sheriff came to serve papers upon his wife that she would not burn the house down.

Arthur Fabre called as a witness, testified as follows:

That he lives at 9216 Starring Court, the same street on which the Fontenot's house was before the fire; that he talked to Martin M. Fontenot, Jr., the petitioner's husband, that Friday before the incident, who told him that Martin told him he was going to Houston and wanted him to keep check on his horses, and that he did on the evening of the fire about 6:05 or 6:10 p.m. at which time the petitioner's car was in the yard, a station wagon, in the driveway and that the petitioner said to him she was wondering who was going to take care of the horses; that when he had finished taking care of the horses and came back Mrs. Fontenot's car was gone; that he tried the front door and it was locked and he tried the side door and it was locked; that after he had gotten home and was engaged in a conversation in his backyard with Russell Mayfield and a Mr. Pitcher while he was cutting grass **a kid drove up on a bicycle** in Mr. Pitcher's driveway and said that Mr. Fontenot's house was on fire.

Mr. Fabre does not deny that he was the last person known to be upon the property before the fire started, even though it was **a kid on a bicycle that spread the alarm that the Fontenot's house was on fire**; that he (Fabre) and Mr. Fontenot, Jr., were good friends, beer-drinking friends together; and in answer to question by the Court Mr. Fabre stated that their was only one side door to that house.

Gary David Newman, the Assistant Chief Fire Investigator for the City of Baton Rouge, testified, *inter alia*, as follows:

That in the course of his duties with the Baton Rouge Fire Department that he investigated the fire that occurred on July 17, 1995. The fire had been mostly extinguished when we arrived.

Mr. Edward Christian Salisbury, the owner and investigator for Fire Services was called and accepted as an expert witness in the origin and cause of the fire, testified that the fire occurred in and was partially confined to the master bedroom and the master bedroom's closet; that the double dead bolt on the side door had been forced open by the fire department; that he did not know who started the fire; that he was not informed that Mr. Fabre was actually the last known person upon the premises before he had finished feeding the horse; that he (Mr. Salisbury) **had placed Mr. Fabre upon the premises hours before the fire started,** as opposed to just before the fire started.

Mr. Robert Marshall Finley, team manager with State Farm Insurance , testified that he was a claim specialist and basically took all the facts surrounding the case, compiled them, and made a recommendation to his management, who went through a claim process committee and it either agrees or disagrees with the recommendation to honor a claim or to deny it, with Attorney's input; the decision was to deny the claim based on the intentional acts of Ms. Fontenot . However, that after reviewing the investigation reports, and talking with the Fontenots, and others, it was concluded/ determined by the committee that Mr. Fontenot could not have had a motive to set the fire; but that Mrs. Fontenot could

have had, and did in fact had motive to set the fire. However, the Court was unable to make a factual distinction between the motives of the insured parties, Mr. and Mrs. Fontenot. What goes for the goose, also, goes for the gander.

Mr. John Edward Harris, administrator at Clinton High School testified, *inter alia*, that he had known Mrs. Fontenot since her childhood days; that he went to high school and college with her; that she never was a person of violent nature; that she was a very nice person.

Ms. Edna Jordan Smith, employed at Bluebonnet Library where she teaches ancestral research skills, etc., testified that she has known Mrs. Fontenot since the seventies; that she never was known to be going around setting fires to anything; that other teachers even talked about how she was so sweet, kind and considerate.

Mrs. Roseta H. Washington, across-the-street neighbor of the Fontenots, testified that when she was left home alone, and all of the rest of the members of the family household had gone out-of-town, "she went out before." She was scared.

Mr. Tillman Brown, Chief Deputy in Quachita Parish Sheriff's Office in Monroe, Louisiana, testified, *inter alia*, that he did not believe Mrs. Fontenot set the fire that burned the house down; but, that he heard Mr. Fontenot say, "that he didn't understand why the goddamn papers wasn't served, and then he also stated that he would probably have her *ass committed* the next day."

Mrs. Barbara Lois Wilson Sharp, a sister of Mrs. Fontenot, the petitioner, testified that out of the blue sky, Mr. Fontenot, the estranged husband of his wife, the petitioner

CHRISTEL W. FONTENOT, called her on Sunday and told her to tell James, Alvin, and Carl, all of whom are lawyers, that CHRISTEL W. FONTENOT, will need a lawyer; and that she questioned him as to why and he replied, she will burn the house down because I am filing for a divorce, and she will be served with the papers, and that he was afraid that when she is served with the papers she will burn the house down; and then, shortly after that she received a call from Martin III (Marty J., the son of Mr. and Mrs. Fontenot) who told her that **daddy** and the **boys** had gone to Houston, and he carried all of them, and mama is at home by herself. That he (Marty J.) was going down to spend the weekend with her (his mother) because **she's afraid to be at home by herself**. But, Marty J. did not go. **She was left alone**.

Martin Fontenot, III (Marty J.), testified that his mother had been suffering mental illness since he was in High School, that would be about 14 or 15 years that she has been mentally ill; **that she was afraid at times of staying at that house by herself**; that it wasn't anything unusual about her just leaving home and going away from home for no reason whatsoever, just other than just to be leaving home; that he did not believe his mama burn that house down; that his daddy travels a lot, **and most times when he travel its rare, that he takes the boys with him; but on this occasion here he took my brothers with him. Most times my brothers are there,** and of course they were in junior high school, and I think one was in High School. I can't remember that well. But anyway, somebody was there, and usually when my brothers are there they would keep me informed of anything. But, on this occasion since nobody was there, they were gone. I took it upon myself, I'm going to check on mama. I mean its just instinct. I knew that daddy had separated from mama and had filed for a divorce. I knew

daddy had moved out, and I knew the divorce was forthcoming. When the papers were going to be served I didn't exactly know what date. I was concerned about it, but couldn't do anything; that after the fire, and when he arrived at the site of the burned house, fire investigators were there and that he went through the house with them **and there was not any paper strewed around and scattered about in the house as they have testified,** but there were indications of pieces of rugs off the floor cut and thrown about in the house; **but he nor they would know who had done that**.

Wilson Warren Wilson, the duly appointed curator of the petitioner CHRISTEL W. FONTENOT, testified that when he arrived upon the site of the burned house on Tuesday immediately following the Monday of the fire, he found the Fontenot's boys there and Mr. Fontenot, who said "see what your sister did?" Then "I said, well how do you know she did it? Maybe it was not her. He said, yes it was her. And tomorrow **I am going to find out why those damn divorce papers were not served, and I am going to have her ass committed"**.

Arlo P. Fontenot, the son of Mr. and Mrs. Fontenot, testified that his **daddy personally told him** that he was getting a divorce from his mother, **that he had filed divorce papers several days prior to Sunday that he was taking them to Houston with him**. That his **mother would occasionally burn paper** in the back **in the customary place** that his father had established for burning grass, trash and other unusables; but she never burn paper that she would take out of the house while cleaning it out of the house other than in the place than that which his father had established,

by custom, for them to burn trash and unusables; that on Friday, next preceding the Sunday of the Monday, next preceding the day of the burning, the Sheriff of the Parish of East Baton Rouge, had come to the house to serve papers on his mother; but she was not home; and he left without having served his mother; but when she came home he told her that the Sheriff had been there to serve papers on her and stated that the papers were from his daddy; and she said I wonder what that is all about; but, that he did not tell her (his mother) that the Sheriff had stated that they were divorce papers; that he only told her that the Sheriff said the papers were from his daddy.

REASONS FOR GRANTING THE PETITION

In this arson-based case the respondent STATE FARM FIRE AND CASUALTY COMPANY, the insurer of the petitioner WILSON W. WILSON, appearing in his capacity as the curator of the interdict, CHRISTEL W. FONTENOT, a mentally ill person prosecuting this action through her duly appointed curator (as of July 17, 1995), is the owner in community of property with her estranged husband, Martin M. Fontenot, Jr., which on that date appears to have been intentionally destroyed by a fire set (started) by an incinerator while the members of the family household were absent from home and the community owned house of the property which was incensed (set on fire) while being insured under a Home Owners' policy of insurance, in full force and effect, issued by the respondent STATE FARM FIRE AND CASUALTY COMPANY, who failed to carry its burden of proof that the subject fire was set by the petitioner, the weakest link of the Fontenots' family household known to be upon the premises (at home) before, or within the proximity of the start of the subject fire (the incendiary); but who was not actually the

last person known to be upon the incendiary premises immediately within the time frame that by established expert testimony that a fire having an origin on the inside of a house would take to manifest itself on the outside of the house so as to attract (draw) the attention of a kid on a bicycle to spread the alarm to Arthur Fabre, the last person actually known to be upon the premises within the immediate next preceding time frame of manifestation of a fire of the nature under discussion according to the testimony of the expert witness, Chief Gary David Newman, of Baton Rouge Fire Department; and that of the witness, Arthur Fabre, who testified that after he had attended the horses of the petitioner's estranged husband, Martin M. Fontenot, Jr., he left the premises of the Fontenot's by way of the side of the house which caught fire on July 17, 1995, and burned down; that the petitioner had already gone and left in her automobile; **that he walked by the house and there was not any indication of a fire** and he got in his vehicle drove home got his lawn mower and started to mow his yard (grass) when two of his neighbors, Russell Mayfield and a Mr. Pitcher came up/or upon or in his yard where he was mowing his yard and engaged him in conversation with them; and while he (Mr. Fontenot) was engaged in conversation with (his) two neighbors **a kid on a bicycle rode up saying (screaming) the Fontenots' house is on fire**.

The Judgment of the District Court, from which the appeal was taken, is imminently correct; and its affirmance is suggested.

Already, hereinabove, abstracted from the trial transcript are the pertinent medical testimonies of the expert witnesses, Drs. Scott David Zetner and Rita Argawal, psychiatrists,

which effectively established factually that the petitioner CHRISTEL W. FONTENOT, is a mentally ill person diagnosed with Bi-Polar Disorder-mixed type; that she has no tendency toward violence; certainly, not toward any violent type of any incendiary behavior. The testimonies of Dr. Zetner and Dr. Argawal corroborate each other; and there is not anything to the contrary. Also, hereinabove, abstracted from the trial transcript are pertinent portions of the estranged husband (Martin M. Fontenot, Jr.) of the petitioner, which reflect his attitude toward the petitioner because she suffers situationally-caused mental illness of **Bi-Polar Disorder-mixed type** and the mother of his five boys, all of whom exhibiting above average intelligence. Certainly, of course, Mr. Fontenot, himself, is a highly intelligent man of praiseworthy achievements and accomplishments, the holder of two Master Degrees in Technological Science, Chemistry and Engineering and is so employed with Ciba-Geigy; and that before he departed (left) to go to Houston, Texas, with all of his boys, on the Sunday immediately next preceding the Monday before the subject incendiary fire on July 17, 1995, he returned to the house and removed their shotguns therefrom, as a matter of fact, this should be taken significantly, because the month of July is not within a hunting season for hunting any type of animal, beast, wildfowl, or creature, especially not in metropolitan Houston. Mr. Fontenot is a very smart man: (1) He was married to the plaintiff for 29 years and of that marriage five intelligent boys were born; (2) he married a very smart, intelligent woman; (3) a life living with his wife, the petitioner, suffering situational-caused mental illness of Bi-Polar Disorder-mixed type became unbearable for him; (4) Mr. Fontenot initiated divorce proceedings because she did not take her medication timely and as prescribed; (5) prior to leaving to go to Houston,

taking all of the boys of the household with him; but leaving his wife (a mentally ill person) behind, he saw-to-it that his horse would be-well-taken-care of while he and the boys were gone, were away; but made no such care-taking arrangement, provision or protection for his sick wife; but heaped upon her more life stressors to bring her to the breaking-point of disaster; (6) and yes, he expressed verbally and by action of conduct self-fulfilling prophecies adversely to petitioner, his estranged wife's interest and cooperatively collaborated with the respondent STATE FARM INSURANCE COMPANY to be paid his community-share of the amount of money owed by the respondent STATE FARM INSURANCE COMPANY, to him and his wife, the petitioner, in community. He did that successfully. Yes, Mr. Fontenot is very smart, intelligent and clever; having the skills, the knowledge and the wherewithal to ascertain the occurrence of the incineration to give the indicia that his wife, from whom he had just recently estranged himself and initiated divorce proceedings against on grounds that her mental illness caused her to be unbearable, so that he could and/or would inure to his community share of money under the liability coverage of the Home-Owners' insurance policy issued to them in co-ownership with the provision that:

SECTION I AND SECTION II—CONDITIONS

2. **Concealment or Fraud.** This policy **is void** as to **you** and any other **insured**, if you or any other **insured** under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

14. **Intentional Acts.** If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss.

The decision of the trial Court is imminently correct that the respondent STATE FARM AND CASUALTY COMPANY failed to carry its burden of proof that the petitioner CHRISTEL W. FONTENOT, appearing herein through her duly appointed curator, was the incinerator on July 17, 1995, of the house of the property municipally designated as 9024 Starring Court, Baton Rouge, Louisiana 70810, owned in community by the petitioner and her then estranged husband, Martin M. Fontenot, Jr., and covered with a Home Owners' insurance policy issued by the respondent STATE FARM AND CASUALTY COMPANY.

ARGUMENT

The petitioner CHRISTEL W. FONTENOT, notwithstanding her mental illness or conditions, she is not entitled to any special **inferences** in her favor, absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, uncontroverted evidence should be taken as true to establish a fact for which it is offered. *Fuller v. Wal-Mart Stores Inc.*, 12285-CA (La. App. 2d Cir. 1988), 519 So.2d 366.

Respondent's refusal to pay petitioner her portion (share) of the community loss due to the destruction of the community owned house destroyed by fire was without probable cause. Cf. *Dauzat v. Amco Underwriters of Audubon Ins. Co.* 7594 (La.App. 3rd Cir. 1980), 386 So.2d 963.

Respondent case failed by not excluding every other reasonable hypothesis that the fire could have been started by other persons that were on the premises after petitioner had left the premises more than an hour before the fire manifested itself to the outside and that petitioners hostiled husband is a chemist and an engineer had left home and returned immediately prior to taking the boys leaving petitioner, in her condition, to protect the premises in spite of his making the self-fulfilling prophesies; but, in the meantime, remembering to have someone to care for his horses; but failed to ascertain whether the side door of the house was locked, which was left unlocked as was testified to by the witness, E.C. Salisbury, Fire Services Principle Investigator. Cf. *Miley v. U.S. Fidelity Guar, Co.*, 94-1204 (La. App. 1st. Cir. 1995), 659 So. 2d 792, writ denied 95-1101 (La. 6/16/95), 660 So.2d 436.

After a criminal investigation for arson, the prevailing insured was entitled to recover. *Farace v. Independent Fire Ins. Co.* 82-3236 (C.A. 5 La. 1983), 699 F.2d 204.

Respondent did not carry its burden of proof; but arbitrary, capricious, and without probable cause denied petitioner to recover her share of loss caused by the fire while allowing her husband to recover his share of loss by fire under the same policy issued to them, the owners in community of the Home Owners' coverages.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court, the Supreme Court of the United States, grant review of this matter.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 5, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-31167

WILSON W. WILSON,
appearing in his capacity as
the curator of the interdict,

Plaintiff-Appellee,

versus

STATE FARM FIRE AND
CASUALTY INSURANCE CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:96-CV-3345

Before GARWOOD, PRADO, and OWEN, Circuit Judges.

Appendix A

PER CURIAM:*

I. BACKGROUND

This case involves Plaintiff-Appellee Wilson's allegation that Defendant-Appellant State Farm Fire and Casualty Company ("State Farm") failed to pay an insurance claim owed to an insured homeowner, Christel Fontenot, when her house was destroyed in a fire. On Monday, July 17, 1995, a fire caused substantial damage to the dwelling owned in community by Christel Fontenot and her husband Martin Fontenot. The house, located in Baton Rouge, was insured by State Farm. At the time of the fire, Martin and Christel Fontenot had been married for approximately twenty-nine years and had owned the house for seventeen years.

About ten years before the fire, doctors diagnosed Christel Fontenot with a bipolar disorder, which involves alternating periods of depression and manic behavior. State Farm alleges that Christel Fontenot's mental illness interrupted her work as a teacher for two years. Moreover, the malady allegedly induced her to neglect her children and to engage in a pattern of excessive spending which she could not afford. Martin Fontenot claims that because he could not persuade his wife to comply with a drug therapy regimen that would stabilize her mental health, he made the decision to end his marriage. Consequently, on July 7, 1995, ten days before the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

fire, he packed his belongings, moved out of the home, and stated that he would be filing for a divorce.

Although it is undisputed that Christel Fontenot was not properly served with divorce papers until after the fire, trial testimony suggests that after Martin Fontenot moved out of the home Christel Fontenot began burning paper in the back yard, an activity that she had not engaged in previously. Additionally, Christel Fontenot began parking in the driveway or on the street in front of the house as opposed to her normal place in the garage, purportedly because there was too much gasoline in the garage.

On the day before the fire, Martin Fontenot took three of his sons on a trip to Houston, Texas, leaving Christel Fontenot alone in the house. After the children departed with their father, Christel Fontenot began ripping out the carpet in the master bedroom of the house. On Monday, the day of the fire, she continued to remove strips of carpet from the home. Additionally, Christel Fontenot spread newspaper throughout the house, taping it to the walls and stuffing it under doors in some instances. Although Christel Fontenot claims that she spread the newspaper in order to inhibit the spread of dust following the removal of the carpet in the master bedroom, newspaper was spread beyond the bedroom's vicinity.

Before departing the residence on the evening of the fire, Christel Fontenot removed framed and loose photographs from the walls of the home, packed two of her three jewelry boxes, and packed a box with numerous personal, family, and work-related documents. Fontenot locked the house and

departed a few minutes before the fire was reported to 911. The Baton Rouge Fire Department received the report of the fire at 6:36 p.m. Although she alleges that when she left her home, she was going to visit friends in Destrehan, Louisiana, Christel Fontenot never reached Destrehan. Instead, she checked into a Baton Rouge motel.

Initially, under sworn testimony, Fontenot stated that she left her home around noon. However, she later recanted. There is testimony from two separate individuals who had conversations with her only minutes before she actually left the house after 6:00 p.m. One of those individuals, Arthur Fabre, a neighbor of the Fontenot family was the last person on the family's property. He had been asked by Martin Fontenot to feed the horses on the property, and noticed that Christel Fontenot's car was gone when he finished his task. A few minutes after departing from the Fontenot family land, while standing outside with a friend, Fabre noticed that the Fontenot family's residence was on fire and called 911. He also attempted to extinguish the flames with a garden hose.

Upon arriving at the scene of the fire, firefighters found that the home had been locked and secured. There were no signs of forced entry. Martin Fontenot, Christel Fontenot, and their kids were the only individuals with keys to the house. Firefighters also noticed that the fire started in the master bedroom closet.

At the conclusion of State Farm's investigation, it decided to deny the Fontenot family's claim under their insurance policy. However, State Farm separately settled with Martin Fontenot after the claim was denied, and paid him

the full amount for his interest in the destroyed property and for that of his children. State Farm's management decided to settle with Martin Fontenot because there was no evidence that Martin Fontenot was involved in causing the loss. Christel Fontenot, on the other hand, was not paid any of her claim against State Farm notwithstanding her claim that she did not start the fire.

On May 23, 1998, the district court conducted a non-jury trial. On March 28, 2003, the district court entered judgment in favor of Plaintiff-Appellee, and against State Farm. State Farm timely filed a notice of appeal. On appeal, this Court determined that (1) the district court failed to assign any written reasons for its ruling in violation of Federal Rule of Civil Procedure 52(a); (2) the district court committed reversible error when it, *sua sponte,* excluded the testimony of Christel Fontenot by finding her to be incompetent to testify; and (3) the evidence in the record did not support the court's judgment. On October 13, 2004, the trial resumed with the parties stipulating that the entire record of the first trial would carry over. The only additional evidence added to the record was the trial testimony of Christel Fontenot. Following that testimony, the district court, again, rendered judgment in favor of Plaintiff-Appellee, and against State Farm. The district court, this time, gave oral reasons for its judgment. On November 4, 2004, State Farm timely filed a Notice of Appeal.

II. STANDARD OF REVIEW

This court reviews a district court's conclusions of law *de novo* and its findings of fact for clear error. *Rimade Ltd.*

v. Hubbard Enter., Inc., 388 F.3d 138, 142-43 (5th Cir. 2004) (citing *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 753 (5th Cir. 1994)). We will only reverse a finding of fact if, notwithstanding evidence to support it, we are left with a "definite and firm conviction" that a mistake has been made. *Justiss Oil Co., Inc. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1062 (5th Cir. 1996). However, when a finding of fact is premised on an improper legal standard, it loses the insulation of the clearly erroneous rule. *Maritrend, Inc. v. Serac & Co. (Shipping) Ltd.*, 348 F.3d 469, 470 (5th Cir. 2003).

III. DISCUSSION

State Farm makes three main claims: (1) the finding for Plaintiff-Appellee was clearly erroneous because Defendant-Appellant submitted sufficient evidence to succeed on its arson defense; (2) after State Farm met its initial burden with regard to its arson defense, the district court should have switched the burden of proof to Plaintiff-Appellee to offer reasonable proof to exonerate herself; and (3) at trial, Defendant-Appellant proved that Fontenot made knowing material misrepresentations of fact concerning her actions, thus voiding the insurance policy. Because we determine that the trial evidence presented by State Farm preponderates in favor of State Farm in such a convincing manner that a finding for Plaintiff-Appellee would be clearly erroneous, we reverse the district court's judgement, and render judgment for State Farm.

First, State Farm claims that the district court erred in finding that it failed to carry its burden of proof to succeed

on its arson defense to policy coverage. Under Louisiana law,[1] to sustain the defense of incendiarism, insurers bear the burden of proving the defense by a preponderance of the evidence—unlike in criminal cases where the State must prove the guilt of an arsonist beyond a reasonable doubt. *Sumrall v. Providence Washington Ins. Co.*, 60 So. 2d 68, 69 (La. 1952). Recognizing that in most cases the only evidence of arson is circumstantial due to the fact that perpetrators of incendiarism do not engage in such activity notoriously, the Louisiana Supreme Court has repeatedly stated that:

> Inasmuch as the defense is arson, the burden rested upon the insurer to establish, by convincing proof, that the fire was of incendiary origin and that plaintiff was responsible for it. It is well settled that the insurer need not prove its case against a plaintiff beyond a reasonable doubt; it suffices that the evidence preponderates in favor of the defense. Proof, of course, may be and invariably is entirely circumstantial. And, in these instances, a finding for defendant is warranted where the evidence is of such import that it will sustain no other reasonable hypothesis but that the claimant is responsible for the fire.

Id.; Rist v. Commercial Union Ins. Co., 376 So. 2d 113, 113-14 (La. 1979). Hence, under *Sumrall,* the preponderance of the evidence standard is the appropriate standard for considering

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1. Because this case falls within federal diversity jurisdiction, we must apply Louisiana law. *See Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 79-80 (1938).

whether or not a defendant has met its burden of proving an arson defense. As an evidentiary matter, "[m]otive plus the incendiary origin of the fire [will], in the absence of believable rebuttal evidence, be sufficient to sustain the affirmative defense pleaded by the insurer." *Sumrall,* 60 So. 2d at 70 (citations omitted).

Some Louisiana appellate courts have, however, construed *Sumrall* to mean that, in cases depending solely on circumstantial proof, the evidence must be so convincing that it will sustain no other reasonable hypothesis but that the plaintiff was responsible for the fire. *Christensen v. State Farm Mut. Auto. Ins. Co.,* 552 So. 2d 1377, 1378-79 (La. Ct. App. 5th Cir. 1989) (citation omitted) ("Where circumstantial evidence is relied upon, the facts, "[t]aken as a whole . . . must exclude other reasonable hypotheses with a fair amount of certainty."); *Wallace v. State Farm Fire & Cas. Ins. Co.,* 345 So. 2d 1004, 1006-07 (La. Ct. App. 3d Cir. 1977) ("When proof is circumstantial, the evidence must be so convincing that it will sustain no other reasonable hypothesis but that plaintiff was responsible for the fire."); *see also Baghramain v. MFA Mut. Ins. Co.*, 315 So. 2d 849, 851 (La. Ct. App. 3d Cir. 1975).

It is this more rigorous standard that the district court seemed to apply in the case at hand. In finding that State Farm did not meet its burden, the court wrote:

> I threw out Fabre not to say that he did it or anything like that, but to say that there are reasonable explanations for what happened other than that Mrs. Christel Fontenot did it. And

> another possible explanation that the court cannot ignore is the fact that Martin Fontenot was only four hours away from Baton Rouge in Houston.... Again, that's not to say Martin Fontenot started the fire, but that is to say that the evidence that Christel Fontenot was the cause of the fire does not — the evidence that she caused it does not exclude — the circumstantial evidence that she caused the fire does not exclude the reasonable possibility that it was started by someone else. Fabre and Martin Fontenot being just two reasonable possibilities.

Hence, the district court subscribed to the notion that in order to prevail on its arson defense, State Farm had to exclude all other reasonable causes of the fire.

There is an obvious tension between the two articulations of the standard of proof insurers asserting the defense of arson must meet. In *Viviano v. Travelers Insurance Company,* 533 F. Supp. 1 (E.D. La. 1981), the district court addressed this very issue. There, the court chose to adhere to the preponderance of evidence standar[illegible]lone. *Id.* at 7. First, the court reasoned that "the preponderance of the evidence requirement bears the imprimatur of the ultimate construer of Louisiana law," the Louisiana Supreme Court. *Id.*

Next, the court explained that the "no other reasonable hypothesis standard" seems to have grown out of a misunderstanding of the holding of *Sumrall. Id.* In *Sumrall,* the facts of that particular case were such that the evidence would sustain no other reasonable hypothesis than that the

claimant started the fire. *Id.* However, there was no holding that the defendant *must* exclude other reasonable possibilities in order to prevail on its arson defense. Rather, the *Sumrall* court emphasized that, in cases relying primarily on circumstantial evidence, a finding for the defendant is *warranted* where the evidence is so strong that it will sustain no other reasonable hypothesis but that the claimant started the fire. *Sumrall,* 60 So. 2d at 69; *see also Viviano,* 533 F. Supp. at 7. Hence, in *Viviano,* the court held that in order to meet the burden of proof regarding an arson defense, the evidence need only preponderate in favor of the defense. *Viviano,* 533 F. Supp. at 7.

We approve of the *Viviano* court's interpretation of Louisiana law and apply the preponderance of the evidence requirement as the proper standard of proof an insurer must meet in order to sustain an arson defense. State Farm not only met this initial burden to sustain its arson defense; but because the circumstantial evidence is so strong, we find that State Farm has also convincingly proven that there are no other reasonable explanations for the fire notwithstanding Christel Fontenot's testimony that she did not start the fire. It is undisputed that the fire was of incendiary origin. Additionally, Christel Fontenot, the only individual with a key to the house in Baton Rouge, left the house only minutes before the fire was discovered. Christel Fontenot's financial pressures and the impending divorce serve as evidence of motive. Moreover, Fontenot's removal of jewelry, family photographs, and important documents just before the fire are also probative of the fact that she caused the loss. Together, this circumstantial evidence preponderates in favor of the defendant in such a way that a finding for Plaintiff-

Appellee, irrespective of the standard used, would be clearly erroneous. The hypothetical reasonable alternatives proffered by the district court find no evidentiary support in the record. Furthermore, a review of the record suggest no other reasonable alternatives in addition to the ones proposed by the district court. Consequently, we reverse the district court's judgement, and render judgment for State Farm. *See Sumrall,* 60 So. 2d at 71.[2] Because we reverse the district court's judgment based on the arson defense, we do not reach State Farm's other arguments.

REVERSED and RENDERED.

GARWOOD, Circuit Judge, dissenting in part:

The trial court's judgment is based on the legally erroneous premise that State Farm's defense of arson required it to eliminate all reasonable possibilities other than the plaintiff's arson. I would accordingly reverse. Given plaintiff's testimony, implausible though it is, — which the trial court may or may not have credited — I would not now render.

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2. In light of the fact that this is our second occasion to correct the district court's errors and because any finding for Plaintiff-Appellee would be clearly erroneous, the interests of judicial economy would best be served by not sending this case back to the district court, notwithstanding Plaintiff-Appellee's claim that she did not start the fire.

APPENDIX B — EXCERPTED ORAL DECISION OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA DATED OCTOBER 13, 2004 AND FILED JANUARY 3, 2005

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 96-CV-3345

WILSON W. WILSON,

versus

STATE FARM FIRE AND
CASUALTY INSURANCE COMPANY,

WAIVED JURY TRIAL

[83] * * *

THE COURT: AND I DON'T GUESS THERE'S ANY BIG MYSTERY AS TO WHERE THE COURT IS GOING WITH ALL OF THIS.

THE BURDEN WAS ON STATE FARM TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT CHRISTEL FONTENOT WAS THE [84] CAUSE OF THE FIRE THAT LED TO THE CASUALTY LOSS IN THIS CASE. AND THE EVIDENCE IN THIS CASE IS NECESSARILY — WELL, NOT NECESSARILY BUT IT IS IN FACT CIRCUMSTANTIAL. AND THOSE — BUT THOSE CIRCLMSTANCES, HOWEVER, DO NOT

INCLUDE THE POSSIBILITY, THE REASONABLE POSSIBILITY THAT THIS FIRE WAS SET BY SOMEONE OTHER THAN MS. CHRISTEL FONTENOT.

THE CONDUCT THAT IS CITED BY STATE FARM THAT MS. FONTENOT ENGAGED IN WERE REMOVING SOME OF HER BELONGINGS FROM THE HOUSE TO ABSENTING HERSELF FROM THE HOUSE PRIOR TO THE FIRE, IS BASICALLY THE SAME CONDUCT THAT MARTIN FONTENOT ENGAGED IN, EXCEPT THAT MARTIN FONTENOT REMOVED ALL OF HIS BELONGINGS; WAS BACK IN THE HOUSE SOMETIME PRIOR TO THE FIRE. AS I SAID BEFORE, HE ALSO RETAINED A KEY TO THE HOUSE, WHICH COULD HAVE ALLOWED HIM ACCESS TO THE HOUSE EVEN IF IT WAS LOCKED, AS THE FIRE DEPARTMENT FOUND IT TO BE AT THE TIME OF THE FIRE. AND HE HAD JUST AS MUCH, QUOTE, UNQUOTE, MOTIVE, IF YOU TO WANT CONSIDER THAT, AS MS. CHRISTEL FONTENOT DID. IN FACT, POSSIBLY MORE, BECAUSE THE EVIDENCE IS THAT HE HAD ALREADY INITIATED PROCEEDINGS TO START TO GET A DIVORCE. THERE WERE BILLS THAT HAD BEEN RUN UP BY MS. FONTENOT DURING, I GUESS, DURING THE MANIC STAGES OF HER ILLNESS. SO THERE WERE APPARENTLY FINANCIAL PROBLEMS IN ADDITION TO THE OTHER PROBLEMS IN THE MARRIAGE. AGAIN, THAT'S NOT TO SAY THAT MARTIN FONTENOT STARTED THE FIRE, BUT THAT IS TO SAY THAT THE EVIDENCE THAT CHRISTEL FONTENOT WAS THE CAUSE OF THE FIRE DOES [85] NOT — THE EVIDENCE THAT SHE CAUSED IT DOES

NOT EXCLUDE — THE CIRCUMSTANTIAL EVIDENCE THAT SHE CAUSED THE FIRE DOES NOT EXCLUDE REASONABLE POSSIBILITY THAT IT WAS STARTED BY SOMEONE ELSE. FABRE AND MARTIN FONTENOT BEING JUST TWO REASONABLE POSSIBILITIES.

STATE FARM HAD THE BURDEN TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT CHRISTEL FONTENOT WAS THE CAUSE OF THE LOSS IN THIS CASE, AND THE COURT FINDS, AFTER CONSIDERING THE TESTIMONY OF MS. FONTENOT, COUPLED WITH THE PREVIOUS TESTIMONY TAKEN IN THIS MATTER AT THE FIRST TRIAL, THE COURT FINDS THAT STATE FARM HAS FAILED TO CARRY THAT BURDEN.

I DO NOT FIND THAT THEY HAVE ESTABLISHED THAT SHE CAUSED OR EVEN CONTRIBUTED TO THE LOSS THAT OCCURRED IN THIS CASE. AND I DO NOT FIND THEIR REFUSAL TO PAY UNDER THE POLICY OF INSURANCE, WHICH WAS MAINTAINED ON THE RESIDENCE. I DO NOT FIND A REFUSAL TO PAY AS TO CHRISTEL FONTENOT TO BE REASONABLE.

SO THE COURT WILL ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF IN THIS MATTER, AND AGAINST STATE FARM. AND PRIOR TO THE FIRST TRIAL OF THIS MATTER THE AMOUNTS WAS STIPULATED AS THE LOSSES IN THIS CASE. AND THAT WAS ONE HALF OF THE AMOUNT OF DAMAGE OR THE VALUE OF THE DAMAGE TO THE DWELLING, WHICH WAS $66,047.63. MS. FONTENOT'S ONE-HALF

OF COMMUNITY PROPERTY ITEMS WHICH WERE LOST IN THE FIRE WHICH WERE $15,309.34, AND PERSONAL ITEMS WHICH WERE LOST IN THE FIRE TOTALING $3, 343.92. [86] MY FIGURES ARE CORRECT ON THOSE AMOUNTS, AREN'T THEY?

MR. FORRESTER: I BELIEVE, YOUR HONOR, IT'S STIPULATED IN THE RECORD.

MR. JONES: WHATEVER IS STIPULATED.

THE COURT: AND I TOTAL THAT TO COMING TO $84,700.89, SO THE COURT —

MR. DOPES: I THINK IT CAME TO 87.

THE COURT: SIR?

MR. JONES: I THINK IT CAME TO 87 SOMETHING.

THE COURT: THAT'S WHAT I JUST SAID. AND IT'S $84,700.89. THE COURT WILL ENTER JUDGMENT IN THAT AMOUNT IN FAVOR OF CHRISTEL FONTENOT AND AGAINST STATE FARM WITH INTEREST FROM DATE OF JUDICIAL DEMAND.

AND THE COURT MAY SUPPLEMENT THESE ORAL REASONS WITH WRITTEN REASONS AT A LATER DATE, BUT THAT WILL BE THE JUDGMENT OF THE COURT IN THIS MATTER.

THANK YOU ALL VERY MUCH.

* * * *

Supreme Court, U.S.
FILED
AUG 24 2006
CLERK

No. 06-187

In the Supreme Court of the United States

WILSON W. WILSON, et al.,
Petitioners,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit found that the District Court erred in finding that State Farm failed to carry its burden of proof that Christel Fontenot was guilty of setting the subject fire.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent State Farm Fire and Casualty Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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SUMMARY OF REASONS TO DENY THE PETITION

Petitioner has presented no "compelling reasons" for this Petition for Writ of Certiorari to be granted. *See Sup. Ct. Rule 10.* Specifically, Petitioner seeks only a review of the Fifth Circuit's opinion that the District Court's findings of fact were clearly erroneous. The Fifth Circuit also found error in the legal standard applied by the District Court, but Petitioner makes no objection to that in the present Petition.

The Petition is purely factual and the trial record offers substantial support for the Fifth Circuit's holding that the District Court was clearly erroneous in ruling that State Farm did not carry its burden of proof that Christel Fontenot started this arson fire. Indeed, the factual record provides overwhelming evidence that the Opinion of the Fifth Circuit is correct.

Accordingly, Petitioner has failed to demonstrate any compelling reasons for the Court to grant the Petition.

STATEMENT OF THE CASE

On Monday, July 17, 1995, a fire caused substantial damage to a dwelling located at 9024 Staring Court in Baton Rouge, Louisiana, which dwelling was insured by State Farm. It was undisputed that the fire was intentionally set. The following is a summary of the evidence presented at trial to support State Farm's defense that Christel Fontenot started the fire.

A. Background of the Fontenots

Christel Fontenot and Martin Fontenot owned the house for about 17 years, before the fire. By 1995, they had been married for 29 years and had five sons; Marty, age 25, Brodi, age 18, Arloe, age 17, Jacques, age 14 and Nigel, age 11. At the time of the fire, only Arloe, Jacques and Nigel remained residents of the household.

Christel Fontenot had been a school teacher and librarian until 1993. Martin Fontenot was an environmental engineer with a large chemical company, near Baton Rouge, and he taught graduate chemistry courses on the university level, in his spare time.

About ten years before the fire, Christel Fontenot was diagnosed with a bi-polar disorder which involved alternating periods of depression and manic behavior. Those undesirable highs and lows are controlled by the drug Lithium, which was prescribed for Mrs. Fontenot. While taking that medication, Mrs. Fontenot did well as a school teacher and mother. She was employed as a school teacher/librarian until the end of the school year in 1993. At that point and several times before, she simply refused to take her Lithium and her behavior deteriorated. She did not work during the

1993/1994 and 1994/1995 school years. When depressed, she became withdrawn at home, exerting little effort to care for her sons. During manic periods, she was hyperactive and engaged in excessive spending. That situation was aggravated by the fact that Martin Fontenot was required by his company to travel extensively. The oldest son Marty testified that he and his younger brothers basically were "fending for themselves."

Martin Fontenot's efforts to get his wife to comply with the drug therapy were unsuccessful. He sought assistance in counseling through his priest, her siblings and his company's Employee Outreach Program. He took other steps which failed. He asked that his wife be committed in the year before the fire, but that request was refused by the Coroner, when Mrs. Fontenot assured the Coroner that she would resume taking her Lithium.

Martin Fontenot testified that he made the decision to end the marriage in 1995. He had a family conference with his sons and moved out of the house on July 7, 1995, ten days before the fire. At that time, he packed his clothes and told his wife that he would be filing for a divorce. It was the first time that he had taken that action.

B. The Fontenots' Activities Before the Fire

Arloe Fontenot testified that his mother acted in a number of strange ways after his father moved out on July 7th. She started burning paper in the back yard, which she had not done before. He was concerned and asked her not to burn any of his stuff. She started parking on the street or in the driveway, instead of her usual place in the garage. When Arloe asked her why, she responded that there was too much gasoline in the garage.

For some time, Martin Fontenot had planned a trip to Texas with his three youngest sons. Arloe had been invited to visit to the campus of Texas A&M University in College Station, Texas. Mr. Fontenot planned to combine that visit by taking his sons to see their older brother Brodi Fontenot, who was attending the University of Houston, and to visit Astroworld. They intended on leaving Sunday morning, July 16th, since Arloe had a baseball game on that Saturday.

On Friday, July 14th, a Deputy Sheriff attempted to serve Christel Fontenot with the divorce suit from her husband. Arloe and his brothers were playing basketball in their driveway when the Deputy arrived. Mrs. Fontenot had left to run some errands. In her absence, the Deputy waited outside, talking with Arloe; but he left before Mrs. Fontenot arrived. When Mrs. Fontenot returned, Arloe informed her that a Deputy had stopped by "with papers from Daddy."

On Sunday morning, Mr. Fontenot departed for Houston with his three sons, as planned. Arloe visited Texas Tech on Monday. They received a message late Monday evening that the fire occurred, then they returned on Tuesday.

After her sons departed on Sunday morning, Christel Fontenot began ripping up the carpet in the master bedroom in small strips, first using scissors and then a knife. As the strips of carpet were pulled off the floor, Mrs. Fontenot carried them to the street during the day. Mrs. Fontenot spent the night at the house that Sunday night. On Monday morning, the pile of carpet was removed by garbage collectors.

During the day on Monday, Mrs. Fontenot continued to pull up and remove strips of carpet from the master bedroom. She also spread newspaper throughout the house, taping it to

the walls and stuffing it under doors in some rooms. Mrs. Fontenot later explained that she did not like the carpet and wanted to replace it, but she had not obtained replacement floor covering. She also admitted that she did not have the money to purchase new carpet and her husband had quit giving her money. Mrs. Fontenot explained that the spreading of newspaper in the house was to keep the dust down created by removal of the carpet in the master bedroom, but fire department investigator Gary Newman testified that the newspaper was spread throughout the house, not just near the door to the bedroom. Her son Marty testified that his mother had never damaged the house or its furnishings before that weekend. Martin Fontenot also testified that his wife had not damaged the house like that before that time.

Before departing the house on the evening of the fire, Christel Fontenot removed framed photographs and portraits of family members and herself from the walls of the residence. She also removed a number of loose family photographs. She removed these from the house to her car. At the second trial, she first denied that family photographs were taken, then admitted the fact after being confronted by her testimony in her sworn statement. Mrs. Fontenot also filled a box with numerous personal papers, including her teaching records, family and financial documents. She packed clothes and she loaded beverages into a cooler. These things she also removed from the house to her vehicle. Finally, she also removed two of her three jewelry boxes. Then, she locked the house and departed in her vehicle a few minutes before the fire was reported to 911. Mrs. Fontenot admitted these actions in her sworn statement three weeks (8/8/95) after the loss, confirming the observations of investigator Gary Newman and son Marty on the night of the fire.

Mrs. Fontenot testified that her destination upon leaving that evening was to visit friends Mary and Jim Billip in Destrehan. However, she admitted that they did not know she was coming. She had not called them, or told anybody else of her excursion. She did not know how to get to the Billips' house and still does not. She admits she never got to Destrehan that evening. She testified that she drove down Airline Highway only to turn around and drive back. She then checked into a motel in Baton Rouge rather than going home.

C. Time of Mrs. Fontenot's Departure

The Baton Rouge Fire Department received the report of this fire at 6:36 p.m. on July 17, 1995. In her sworn statement on August 8, 1995, Mrs. Fontenot testified that she left the house "after around 12:00" following a light lunch of "cheeses and stuff."

Witness Dede Earl talked to Christel Fontenot at the insured residence about 15-20 minutes before the fire was reported. Ms. Earl had received a call from the Fontenots' oldest son Marty, who lived in Natchez. He had been trying to reach his mother all day, but she would not answer the phone. So, he called his friend Dede Earl and asked that she go by the house to check on her, before going to her evening class at Louisiana State University. ("L.S.U."). At the time, Ms. Earl was dating Marty's best friend, whose family lived next door to the Fontenots. They were also out of town.

The time of Ms. Earl's visit is well-defined since her class started at 6:30 p.m. Ms. Earl testified that she pulled into the Fontenot's driveway. She knocked and rang the doorbell several times before Christel Fontenot finally appeared. Ms. Earl testified that Mrs. Fontenot looked to be doing house

work. Ms. Earl thought she looked fine and asked Mrs. Fontenot to answer her son's call from Natchez at 7:00 p.m.

Ms. Earl then went next door to her boyfriend's house to feed their dog, and returned to her car in the Fontenot driveway, before departing for the L.S.U. campus. At trial, Ms. Earl estimated that the time of her departure from the Fontenots' was around 6:15 p.m. because she usually drove pretty fast and she arrived on campus right before the class started.

Shortly after the fire, Ms. Earl gave a recorded statement to investigator David Chemin of the Baton Rouge Fire Department. At that time, Ms. Earl estimated that she departed the Fontenots at about 6:20 p.m. that evening.

Arthur Fabre testified that he also spoke to Christel Fontenot within twenty to thirty minutes before the fire. Mr. Fabre had been a neighbor and friend of the Fontenots for many years. Mr. Fontenot had asked him to feed his horses that were kept on a lot at the rear of the Fontenots' property, during his absence in Texas. The time of his arrival and departure are not as well-fixed as that of Dede Earl. He thinks he got there at 6:05-6:10 p.m. He knocked and, after some delay, Mrs. Fontenot came to the door. When he passed the house after feeding the horses, Mrs. Fontenot's car was gone. He then walked to his house which was down the street. Minutes later, he was in his front yard, chatting with a friend, when another neighbor pulled up and reported seeing smoke at the Fontenot house. Mr. Fabre called 911, then he ran to the Fontenot house and tried to fight the fire with a garden hose.

D. The Fire Investigation

Gary D. Newman testified that he was Associate Chief Fire Investigator for the Baton Rouge Fire Department in July, 1995. He was qualified at trial as an expert in the field of determining the origin and cause of fires.

Mr. Newman testified that he was requested to investigate the Fontenot dwelling while the firefighters were putting it out. Upon his arrival, he noticed carpet in the front yard. After the fire was mostly extinguished, he walked through the house and observed a number of things that he considered "unusual." He noticed that pictures were missing from the walls of the house. He also noticed that newspaper was spread and taped in numerous places in the house. He further testified that newspaper was found in six different rooms on the first floor. At the time, he suspected that the newspaper was spread out in the house with somebody's intention "to spread fire from one area to the other," which he referred to as "trailers."

Mr. Newman testified that he identified the master bedroom closet as the area of origin of the fire. It was his opinion that the fire was intentionally set. Mr. Newman further testified that he confirmed with the initial firefighters that the house was locked and secured upon their arrival at the fire and they saw no signs of forced entry before they responded.

Mr. Newman interviewed Christel Fontenot in her attorney's office a few days after the fire. At that time, Mrs. Fontenot informed Mr. Newman that she had locked the house upon her departure the evening of the fire and that only she, her children and Mr. Fontenot had keys to the house.

She admitted spreading the newspapers in the house and cutting out the carpet.

Mr. Newman also testified that no one was at home the evening of the fire, when firefighters arrived. Neighbors told him that Mr. Fontenot was in Houston with his children and that one of the older children was on their way from Natchez. Mr. Newman spoke to him (Marty) when he arrived from Natchez. Marty Fontenot brought it to Mr. Newman's attention that two of the three jewelry boxes that his mother usually kept in her vanity had been taken out and the Marty stated more than once, "I can't believe my mother burned the house up . . ." Marty also told Mr. Newman that he had asked Dede Earl to check on his mother. Ms. Earl was interviewed the following week by David Chemin, another investigator with the Baton Rouge Fire Department.

Mr. Newman concluded that the fire was set by Christel Fontenot and he issued a warrant for her arrest. Concerning his opinion, he testified as follows:

A. "Knowing the overall circumstances, we were aware that we could place Mrs. Fontenot in the home for just a few minutes before the fire was turned in, knowing that the fire would probably burn a few minutes before it was observed and turned in because it was in the interior of the house, in a closet, in a bedroom. So we know it burned a little while."

Q. Can you estimate how long it burned before it would have been observed?

A. "I think it would be hard to say, but I would have to say 8, 10 minutes, just depending. I mean, I

> have seen houses burn a good while and nobody called it in, so maybe before the smoke was actually seen outside then when did somebody see it to turn in."

Mr. Newman further testified, "I know that Mrs. Fontenot was there 5 to 10 minutes before the fire was turned in." He testified that that time frame was provided by Dede Earl's recorded statement and that the fact that the house had been found locked played a large part in his opinion. He further testified that his investigation yielded no evidence that Martin Fontenot or anyone else, other than Christel Fontenot, was responsible for setting the fire.

Robert M. Finley testified that he was assigned to investigate the Fontenot claim in 1995, as a State Farm claims representative. At trial, Mr. Finley summarized the reasons that he concluded that the fire was set by Christel Fontenot. He testified that at the conclusion of his investigation, he denied the entire claim, pursuant to Louisiana law and the language of the State Farm policy. However, he testified that he negotiated a settlement with Martin Fontenot, Sr. after the claim was denied, which involved full payment for his interest in the property and that of his children, which payments were the subject of the Stipulation at the beginning of the trial. Mr. Finley testified that the decision was made to settle and pay Mr. Fontenot's claim, because State Farm felt that there was absolutely no evidence that Mr. Fontenot was involved in causing the loss and that it was the right thing to do.

At the conclusion of its investigation, State Farm paid Martin Fontenot $81,356.97 and made payoffs to the two mortgagees on the house totaling $32,995.06.

E. Christel Fontenot's Motives

At trial, plaintiff called two Monroe psychiatrists, who began treating Mrs. Fontenot about six months after the fire. They testified that she was not inclined to criminal behavior or property damage as a result of her bi-polar disorder.

State Farm never argued that Mrs. Fontenot's bi-polar disorder was the reason this fire occurred. People commonly do uncharacteristic things during times of stress. Mrs. Fontenot is no different. It is common knowledge that divorce, death, unemployment and financial problems are among life's greatest stressors, and, it is not surprising that Christel Fontenot acted in a very unusual manner in the 10 days between the time of her husband's departure and this fire.

Arloe Fontenot testified that his mother was burning fires in the backyard after his father left, which she had not done before. Arloe Fontenot also testified that his mother began parking on the curb at the street and in the driveway, rather than the garage. Her son asked her why and she responded that he should not park in the garage either, because "that was too much gasoline too close to the house." Arloe also testified that she had never acted like that before.

Mrs. Fontenot's activity cutting up and removing carpet in the master bedroom also offers dramatic evidence of her upset over the impending divorce. At the same time, she spread newspaper throughout the house, which the Fire Department noted with interest. So, when she left that Monday evening, the floor in her bedroom was mostly concrete and newspaper was everywhere. Marty Fontenot testified that his mother had never damaged the house like that before.

As her psychiatrists and family reported, Mrs. Fontenot's activities in burning fires, parking away from the house and ripping out carpet was not her typical behavior. It began when her husband left and continued until the time immediately before this fire occurred, according to her children.

At trial, plaintiff's counsel attempted to paint the picture that Christel Fontenot was unaware of the divorce suit when the fire occurred, so there was no reason for her to be upset. It is undisputed that she was not formally served with the suit until three days after the fire, but it is also clear that she knew it was coming. Martin Fontenot testified that he told her that he would be filing the divorce suit. More importantly, Arloe Fontenot testified that a Sheriff's Deputy was at the house the Friday before the fire to serve his mother, who was running errands, and that he told his mother upon her return that a Deputy Sheriff had been there to give her "papers from Daddy." At the second trial, Ms. Fontenot admitted that her son told that to her, but she allegedly thought the deputy's visit was to sell her fund-raising tickets. It was not a credible story.

In addition to the emotional distress of the divorce, Mrs. Fontenot was presented with financial pressures as well. She had been the librarian at Scotlandville Magnet High School during the school year of 1992-1993, but she did not work in 1994 or 1995. Irresponsible spending had been one of the manifestations of her bi-polar disorder. Martin Fontenot testified at trial that she had surreptitiously applied for and obtained credit cards in 1994, on which she was not making payments. She attempted to hide these debts from him by disposing of the bills. Arloe Fontenot testified that he fielded calls from collectors harassing her for payment. Those financial pressures would obviously have been aggravated by

the divorce from her husband, especially if he gained custody of their three sons. At trial, Ms. Fotenot testified that her husband was not giving her any money to support herself or take care of the house.

The trial evidence also showed that Christel Fontenot was aware of the claims process with State Farm. In 1994, she reported the theft of her wedding rings to State Farm. Her story was that she had been working in the garden and realized that they were missing, so she surmised that they had been stolen. State Farm paid the claim. Notably, Mrs. Fontenot kept it a secret from her husband. At trial, Martin Fontenot testified that he retrieved the mail one Saturday and that there was a letter from State Farm about the earlier payment on the claim. Before that, he had not even been told that his wife had lost any jewelry or that she had filed an insurance claim and received payment.

F. Acts of Preparation - Compelling Proof

One of the most incriminating items of proof in an arson case is evidence that an insured removed personal items of economic and sentimental value shortly before the fire occurred.

Before leaving minutes before the fire was reported, Christel Fontenot took her jewelry boxes and placed them in her car. She also loaded another box with numerous items of sentimental value. The firemen noticed that several picture hangers were bare on the walls of the Fontenot home when they first entered to fight the fire. Confronted with this, Mrs. Fontenot admitted in her sworn statement that she had removed pictures of herself and her family that were hanging on the walls and placed them in a box which she took with her. She also testified that she took her teacher notes and a

number of other personal papers. She had a change of clothes, a hat, a jacket and a cooler with drinks, too.

In her sworn statement, she admitted that the day of the fire was the first time that she had ever taken jewelry from her house when going for a drive. She also admitted that it was the first time that she had ever taken family pictures and valued documents for a drive. At trial, she also admitted that she never before stayed at a motel when her husband and children were gone. She also admitted that she was left at home numerous times when Mr. Fontenot took his sons hunting in Mamou. Plaintiffs offered no reasonable explanation for that very peculiar behavior immediately before the fire. State Farm urges the Court to see that there is no sensible explanation for Mrs. Fontenot taking those valued personal items, except to purposefully save them from the fire.

G. Actions After The Fire

Christel Fontenot did not return home from her drive that evening. She checked into the Shoney's Inn in Baton Rouge. She did not go back to the house the next morning when she woke up. That odd behavior presents a clear picture of someone who is avoiding a very uncomfortable situation.

Plaintiff's counsel argues that it was just a coincidence that she happened to spend the night away from the house the night of the fire. A neighbor Clara Washington was called at trial to say that Mrs. Fontenot told her on one prior occasion before that she had spent the night in a motel when her husband and children were out of town, though she could offer no details. In her sworn statement, Mrs. Fontenot was asked if she had ever stayed in a motel before on one of her drives. She answered coyly: "I may have." At trial, she

admitted that it was never done before. Ms. Fontenot's rationale for staying away from the house also strains credibility. She claimed that she did not return home because it was dark; but she acknowledged that she stayed the previous night alone in the house, as she had many times before.

Her behavior the next morning was also very suspicious. Marty and his wife Danielle began calling motels the next morning when they had not seen or heard from his mother. After several calls, they tried Shoney's Inn and Marty's wife was put through to her room. At that time, Christel Fontenot said, "I am not ready yet," and hung up. Danielle tried again and Mrs. Fontenot simply picked up the receiver and hung up the phone without saying anything. At trial, Mrs. Fontenot offered the explanation that she thought the motel office was calling to fix her toilet.

Marty Fontenot's testimony about his mother's arrival at the fire scene is also noteworthy. She said, "My house, my house," and he asked her, "Mom, what happened?" She would not answer and he asked her again several times. At trial, he testified that he was angry. It was obvious that it bothered him that she would not talk to him about the cause of the fire. A few minutes later, she reported to have chest pains and she was taken to the hospital where she was examined and released.

APPLICABLE STATE LAW

On the arson defense, the standard is well-settled in Louisiana law, which applies in this diversity case. The insurer has the burden to show that the fire was of an incendiary origin and that an insured was responsible for it. Rist v. Commercial Union Insurance Company, 376 So.2d 113 (La. 1979). The burden is to prove the defense by a **preponderance of evidence**. Sumrall v. Providence Washington Ins. Co., 60 So.2d 68 (La. 1952); Rist, supra; Farace v. Independent Fire Insurance Company, 699 F.2d 204 (5 Cir., 1983). Additionally, the insurer may prove its arson case entirely with circumstantial evidence. Sumrall, supra; Rist, supra; Farace, supra; Viviano v. Travelers Ins. Co., 533 F. Supp. 1 (La. E.D., 1981); Christensen v. State Farm Mutual Auto Ins. Co., 552 So.2d 1377 (La. App. 5 Cir., 1989).

In arson trials, there is also a shift in the burden of proof in Louisiana law. Once the insurer presents prima facia proof that the fire was incendiary and that an insured was responsible, the plaintiff is then required to offer convincing evidence that a named insured is not to blame. Rudison v. Michigan Millers Mutual Ins. Co., 152 So.2d 407 (La. App. 1 Cir., 1963); Swindle v. Maryland Casualty Co., 251 So.2d 787 (La. App. 1 Cir., 1971); cert denied 259 So.2d 217 (1971); Christensen, supra; Briggs v. New Hampshire Indem. Co., 579 So.2d 1221 (La. App. 3 Cir., 1991).

The evidence and testimony in this case fully support the Fifth Circuit's finding that the District Court erred in ruling that State Farm failed to meet its burden of proof that Christel Fontenot was responsible for intentionally causing the fire to her home.

MISSTATEMENT OF FACT BY PETITIONER

There is no record that the criminal charge of arson against Petitioner was dismissed for insufficient evidence. In fact, the charge was dismissed due to a failure by the District Attorney's Office to subpoena witnesses, after being called for trial twice.

REASONS FOR DENYING THE PETITION

Based on the foregoing evidence, the Fifth Circuit reversed the decision of the District Court, finding that State Farm not only met its initial burden of proof in regard to the arson defense, but also that the circumstantial evidence was so strong that there was no other reasonable explanation for the fire. Based on the facts of this case, such a finding is clearly correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 06-187

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILSON W. WILSON, appearing in his capacity as the curator of the interdict, CHRISTEL W. FONTENOT,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Even though, respondent STATE FARM FIRE AND CASUALTY INSURANCE COMPANY (hereinafter **"respondent" or "State Farm"**) contends that the fire was intentionally set (BIO pg. 2)[1] and that it denied the **entire claim**, pursuant to Louisiana law and the language of the State Farm policy. However, State Farm negotiated a settlement with Martin Fontenot, Sr. (the insured in community with the petitioner Christel W. Fontenot), which involved full payment of his interest in the community property and that of his children (BIO pg. 10), which, the negotiated settlement, petitioner shows to be contrary to the language of the policy:

SECTION I AND SECTION II-CONDITIONS

> 14. **Intentional Acts**. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss. (PWC, pgs. 15-16)[2]

The fact, which is absolutely undisputed, that State Farm paid petitioner's husband who owns and undivided one-half interest in the community property was/is and **acknowledgment** by State Farm that **the fire was not intentionally set by a named insured under the policy**.

The negotiated settlement by State Farm to pay one of the insured under the policy unequivocally established that the evidence was devoid proof that the fire was intentionally set by either of the insured owners of the property in

1. BIO – Brief In Opposition

2. PWC – Petition for a Writ of Certiorari

community; and accord greater weight, credibility, validation and justification of the reasons for judgement by the District Court's finding of fact and holding that State Farm failed to carry its burden of proof that the fire was set by petitioner and that it could not have been set by some person other than petitioner. (PWC/App. A, pgs. 8a-9a)

State Farm emphasizes that "One of the most incriminating items of proof in an arson case is evidence that an insured removed personal items of economic and sentimental value shortly before the fire occurred." (BIO pg. 13)

However, State Farm apparently overlooks the undisputed fact that petitioner's husband Martin Fontenot moved out of the house, took the keys to the house with him, removed certain of his personal and sentimental items of belongings with him; but forgetting to take the hunting guns with him, but remembering to ascertain that his horse would be well cared for while taking the boys from the house leaving petitioner alone totally unprovided for in her known mental condition; but, upon leaving the house on Friday, filing a petition for a divorce and agonizing over the situation, mentally searching for further ways and means to induce wrongfully behavioral conduct to assign to the petitioner suddenly remembered that he had not removed the hunting gun from the house, returned to the house on Sunday using the keys he had kept in his possession and went into the house to get the hunting guns out of the closet and removed them from the house, which, of course, is equally, or more, incriminating acts of proof of arson assignable and applicable to petitioner's now divorced husband owning insured property in community with petitioner in this arsenal case than to petitioner. (PWC, pgs. 6-7)

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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